Supreme Court, U.S.
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No. 96-

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1996

LOUIS M. MAINIERO,

Petitioner,

vs.

EURIAL K. JORDAN, Administrator,
Division of Probation and Parole,
and JAMES E. DOYLE, Attorney
General of Wisconsin,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the amendments to 28 U.S.C. §2254(d) enacted as part of the "Antiterrorism and Effective Death Penalty Act of 1996" ("AEDPA"), which restricted the availability of federal habeas relief for state prisoners held in violation of the federal constitution, apply retroactively to habeas cases already pending at the time of its enactment on April 24, 1996.

2. Regardless whether the AEDPA amendments properly apply retroactively to Mr. Mainiero's petition, was the court of appeals correct in applying an "abuse of discretion" standard to review a trial court's decision that certain exculpatory evidence is not "material" and thus need not be disclosed to the criminal defendant as a matter of due process.

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**PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT**

PETITION FOR WRIT OF CERTIORARI

Petitioner Louis M. Mainiero respectfully requests that the Court issue a writ of certiorari to review the judgment of the United States Court of Appeals affirming the denial of

habeas corpus relief.

OPINIONS BELOW

The opinion of the court of appeals, *Mainiero v. Jordan & Doyle*, 105 F.3d 361 (7th Cir. 1997), is in Appendix A. The unpublished order of that court denying reconsideration is in Appendix B.

The unpublished decision of the district court is in Appendix C.

In Appendix D is the unpublished order of the Wisconsin Supreme Court, denying permissive review of the published decision of the Wisconsin Court of Appeals, which had affirmed Mainiero's conviction. *State v. Mainiero*, 531 N.W.2d 326 (1995). Appendix E is the Wisconsin Court of Appeals decision, *State v. Mainiero*, 189 Wis.2d 80, 525 N.W.2d 304 (Ct. App. 1994). Appendix F is the state trial judge's in chambers ruling on Mainiero's request for disclosure of exculpatory evidence.

JURISDICTION

The court of appeals entered judgment on January 27, 1997, and denied Mainiero's timely request for rehearing of that decision on March 4, 1997. This Court's jurisdiction is

invoked under 28 U.S.C. §§1254(1) & 2101(c) and Supreme Court Rule 13.3. As he did below, Mr. Mainiero asserts the deprivation of rights secured by the United States Constitution and 28 U.S.C. §§2241-2254.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This petition concerns the construction and application of the Due Process Clause of the Fourteenth Amendment to the United States Constitution which provides:

> No state shall ... deprive any person of life, liberty, or property, without due process of law....

U.S. Const. amend. XIV.

It also involves 28 U.S.C. §2254(d) (as amended by the "Antiterrorism and Effective Death Penalty Act of 1996"), which provides as follows:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim--
>
> (1) resulted in a decision that was

> contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

STATEMENT OF THE CASE

Up until March of 1992, Lou Mainiero led a fairly typical middle class life. He lived in the suburbs, was married (to Sharon Banaszewski), and had two young daughters. Both Sharon and Lou worked at General Electric Medical Systems in Waukesha, Wisconsin, Sharon as a software development manager and Lou as a systems engineer. Both spouses had master's degrees in electrical engineering from Marquette University. Lou had extensive clinical application background and at the time of trial was working on a cancer detection and therapy treatment program at GE.

On occasion, either Lou or Sharon would have to be out of town for work either overnight or for longer periods. They would then hire a baby-sitter to provide extra help with

the kids. The baby-sitters would also help prepare meals and clean up. Occasionally, it was most convenient for the baby-sitter to spend the night at the Mainieros' home.

The complainant, J.M., began baby-sitting for the Mainieros in September, 1991. Her parents, Cynthia M.-Thomas and Peter Thomas, were friends of the Mainieros.

J.M. baby-sat for the Mainieros on several occasions between the fall of 1991 and the end of February, 1992. On March 14, 1992, however, J.M. failed to appear for a scheduled baby-sitting job at the Mainieros' home. Mainiero later learned that, on March 12, 1992, J.M. had claimed that he had been touching her inappropriately over a period of about five months.

The State of Wisconsin subsequently charged Mainiero with two counts of sexual contact on February 9, 1992, with a person under 16 years of age in violation of Wis. Stat. §948.02(2) (Count 1 — contact with breasts; Count 2 — contact with vaginal area), and one misdemeanor count of trespass to a dwelling in violation of Wis. Stat. §943.14 (Count 3).

According to J.M.'s trial testimony, Mainiero began touching her breasts while giving her massages sometime in October or November, 1991, and subsequently began touching her buttocks and vagina with his hands and kissing her

breasts.

She also claimed that Mainiero touched her inappropriately on February 9, 1992, while his wife was away and J.M. was baby-sitting. As they were lying on the floor watching the Olympics, according to J.M., he began rubbing her back and later her breasts and vagina with his hand. He also licked and kissed her breasts a couple of times.

To corroborate the complainant's allegations, the state presented evidence that her behavior changed in the winter of 1991-92; that she began caring less about her appearance and acting withdrawn, fearful and upset; that other students were concerned about her mental state; that she looked scared and unhappy when she went to speak with the school social worker; that she felt confused and even suicidal about what had happened; that she was crying and very upset on March 12, 1992; that she checked into the Waukesha Memorial Hospital Psychiatric Unit after speaking with the school social worker on that date; and that she was still receiving counseling at the time of trial.

When asked, the complainant testified that the depression and suicidal thoughts which lead to her hospitalization were caused *solely* by the alleged assaults.

The state emphasized the complainant's psychiatric hospitalization both in its examination of defense witnesses

and in its closing argument. According to the state,

> the fact that this caused her so many problems when she talked about it, and she ended up at Waukesha Memorial Psych Ward shows you that something was definitely bothering this fifteen year old girl. And what was bothering her was that for a long period of time, she was going over there baby-sitting and Mr. Mainiero had been sexually assaulting her.

The claimed sexual contact "[d]rove this girl to a psychiatric unit at Waukesha Memorial Hospital."

According to the state, therefore, the complainant's emotional and psychiatric problems, culminating in her hospitalization, could be explained only by the claimed sexual assaults. The state trial court concurred in this theory that the complainant's psychiatric problems and hospitalization were corroborating circumstantial evidence supporting her allegations of sexual assault (R18:Exh. 2 at 628).

What the complainant failed to disclose, however, was that, during the same time that her mother and friends were noticing this depression, a depression which she and the state claimed could have been caused *only* by the alleged sexual assaults, she was sad and grieving the death of a friend from leukemia. In other words, the "exclusive cause" theory which provided the primary if not only corroboration for the complainant's story was simply untrue. Mainiero's jury,

however, never learned that the complainant's testimony was contrary to the facts and that there was a reasonable alternative cause for her depression. Mr. Mainiero and his lawyer did not even learn of those facts until after the trial.

The prosecutor and the state trial court knew, however.

Prior to trial, petitioner moved for *in camera* review by the court of the psychiatric records from Waukesha Memorial Hospital relating to the complainant's treatment and disclosure of such records to the extent they were exculpatory, *see, e.g.*, *Pennsylvania v. Ritchie*, 480 U.S. 39 (1987). A:3. The state consented to such review and, after reviewing those documents itself, provided them to the court.

The parties argued the motions, with others, at the beginning of the trial (R18:Exh. 2 at 11-14, 16-17). The state argued that the complainant's hospitalization was relevant because it was caused by the sexual assault, and thus bolstered the complainant's credibility. It also argued that the psychiatric records should not be released because the complainant had asserted her doctor-patient privilege and because release of those records would "disturb" the complainant. Defense counsel, however, pointed out that denial of the psychiatric records would deprive him of a fair opportunity to challenge the state's claim that the

hospitalization was caused by the alleged sexual assault.

The trial court denied the motion *in limine* and, after reviewing the psychiatric records *in camera*, refused to disclose any part of them to the defense. *See* A:3. The court dictated its statement of reasons for this decision in chambers sometime during the trial. That decision was not released to the parties until it was transcribed, after trial, along with the rest of the trial transcripts, for purposes of the direct appeal. E:7; *see* F:3.

Although that decision does not detail what is contained in the records, it does reflect that the complainant was hospitalized for "suicidal ideations," and that she was diagnosed as being depressed and suffering from post-traumatic stress disorder. From the trial court's decision, it appears that the records focus primarily upon the complainant's allegations of sexual assault as the activating cause. F:2.

Most importantly, however, the trial court's order also discloses the fact which the complainant withheld from the jury, *i.e.*, that she was grieving the death of a friend from leukemia during the month of January, 1992. F:2. The friend's illness and death thus coincided in time with both the alleged sexual assaults and the complainant's emotional

problems and behavioral changes relied upon by the state as corroborating her claims of sexual assault.

Mainiero renewed his request for disclosure of the psychiatric records and his objection to admission of the evidence of the complainant's hospitalization throughout the trial (R18:Exh. 2 at 21-22, 286-87, 713-15; R18:Exh. 2 (Tr. 1/20/93) at 93-94). The trial court consistently denied the requests, even after the complainant testified, contrary to the information in the psychiatric records, that there was no reason for her depression other than the claimed sexual assaults (R18:Exh. 2 at 239, 286-87, 715; R18:Exh. 2 (Tr. 1/20/93) at 93-94).

Mainiero specifically denied J.M.'s allegations of sexual contact. The only two teenaged baby-sitters who had worked for any length of time for the Mainieros both testified to their excellent opinions of Mainiero's character trait for sexual morality with regard to baby-sitters in his home. Dorothy Green, who had known Mainiero for 12 years, testified to her opinion that he is a truthful and honest person.

The jury nonetheless returned verdicts finding Mainiero guilty of the sexual assault alleged in Count 1 but not guilty on the indistinguishable sexual assault charged in Count 2. The jury also convicted on the related misdemeanor trespass charge in Count 3.

The trial judge subsequently sentenced Mainiero to six years incarceration on Count 1 and a consecutive two year term of probation on the misdemeanor trespass.

Mainiero appealed his conviction to the Wisconsin Court of Appeals, raising, among other issues, his claim that the trial court's withholding of the exculpatory psychiatric records denied him due process (R5:Exh. B at 7-20). By that time, Mainiero had learned that, contrary to the complainant's trial testimony and the thrust of the state's argument at trial, there indeed was an alternative source of her depression: the recent illness and death of a friend from leukemia.

By decision dated November 2, 1994, the Wisconsin Court of Appeals affirmed the conviction. E:1-25; *State v. Mainiero*, 189 Wis.2d 80, 525 N.W.2d 304 (Ct. App. 1994). The court recognized that there were no other transactional witnesses or physical evidence, so "this case centered around the credibility of the complainant's and Mainiero's testimony." E:6. That court also acknowledged that materiality, and therefore the right to a new trial as a matter of due process, turned on whether the withheld information "'probably would have changed the outcome of [Mainiero's] trial.'" E:8 (*quoting Ritchie*, 480 U.S. at 58 (1987)).

In rejecting Mainiero's claim, however, the court

relied not upon the probable effect of the withheld information on the jury's credibility determination, but upon the apparent conclusions of the complainant's doctors that the cause of her depression and suicidal ideations was the alleged sexual assault rather than the illness and death of her friend. E:9-10. The court also held that "Mainiero's counsel could have asked the complainant if there were any other reasons why she might have been depressed and suicidal at the time she was admitted to the psychiatric unit," the apparent theory being that a false response would have resulted in disclosure. E:12-13. The court, however, apparently overlooked the fact that she was asked that question and testified contrary to the facts reflected in the psychiatric records.

Mainiero again raised the due process issue in his petition for review to the Wisconsin Supreme Court (R7:Exh. 1 at 6-18). By Order dated January 17, 1995, however, that court summarily denied review. D; *State v. Mainiero*, 531 N.W.2d 326 (1995) (Table).

On June 30, 1995, Mainiero filed his Petition for Writ of Habeas Corpus Pursuant to 28 U.S.C. §2254, and a supporting memorandum. Again, among the issues raised was whether the state trial court's refusal to disclose the material, exculpatory information contained in the complainant's psychiatric records denied Mainiero due

process. (R1:5; R2:7-30).

After the parties briefed the issues raised in Mainiero's petition, the district court denied the petition on March 6, 1996, C:1-14, and entered judgment. The district court granted Mainiero's request for a certificate of probable cause on March 25, 1996.

The Seventh Circuit Court of Appeals affirmed on January 27, 1997. A:1-9; *Mainiero v. Jordan & Doyle*, 105 F.3d 361 (7th Cir. 1997). Relying upon its decision in *Lindh v. Murphy*, 96 F.3d 856 (7th Cir. 1996) (*en banc*), that court held that the intervening amendments to 28 U.S.C. §2254 contained in the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. 104-132, 110 Stat. 1214 ("AEDPA"), apply retroactively to cases, such as this, which were pending at the time AEDPA was enacted. A:3 n.3.

Applying those amendments, as construed by that court in *Lindh*, the court held that the state court's decision cited the correct standard for materiality under *Ritchie*, *supra*, and *United States v. Bagley*, 473 U.S. 667 (1985), and thus "was not 'contrary to' 'clearly established,' relevant Supreme Court precedent." A:5-6 (*quoting* 28 U.S.C. §2254(d)(1) as amended by AEDPA).

Applying an "abuse of discretion standard," the court

of appeals also held that the state court's decision did not involve an "unreasonable application" of prevailing Supreme Court precedent, *see* 28 U.S.C. §2254(d)(1) (as amended by AEDPA), "[b]ecause Mainiero has not established that disclosure of the complainant's psychiatric records would have affected the outcome of his trial." A:6-7.

Mainiero timely filed a Petition for Rehearing with Suggestion for Rehearing En Banc on February 7, 1997. The court denied that petition on March 4, 1997. B:1-2.

REASONS FOR ALLOWANCE OF THE WRIT

I.

BECAUSE THE RETROACTIVITY QUESTION HERE IS EXACTLY THE SAME AS THAT FOR WHICH CERTIORARI WAS GRANTED IN *LINDH V. MURPHY*, CASE NO. 96-6298, IT MAY BE APPROPRIATE TO GRANT THIS PETITION, SUMMARILY REVERSE, AND REMAND THIS CASE IN LIGHT OF THE COURT'S DECISION IN *LINDH*.

On January 10, 1997, the Court granted the petition for a writ of certiorari in *Lindh v. Murphy*, Case No. 96-6298, limited to the first question presented in Mr. Lindh's petition:

> Whether the court of appeals correctly concluded that Congress, despite an explicit provision in §107(c) of the [AEDPA,] failed to

> specify the extent to which the Act's habeas corpus revisions are to apply retroactively to pending habeas cases; and, if so, whether the court correctly interpreted this Court's retroactivity jurisprudence to depend upon proof of actual reliance interests and to create a presumption that habeas-curtailing statutes apply retroactively?

Petition for Writ of Certiorari, *Lindh v. Murphy*, Case No. 96-6298, at i.

This is exactly the first question raised here. Should the Court reverse the court of appeals in *Lindh* and hold that the AEDPA amendments are not retroactive, it would be appropriate in this case to grant the requested writ of certiorari, summarily vacate the decision of the court of appeals, and remand for reconsideration in light of the Court's decision in *Lindh*.

The question of retroactivity could have a substantial effect on the outcome of this case. Under the pre-amendment standard applied by this Court and the vast majority of other circuits, the question of materiality was reviewed *de novo*. *See* Section III, A, *infra*. As construed by the court of appeals, however, the AEDPA calls for application of a highly deferential "abuse of discretion" standard of review. A:6-7.

II.

AEDPA'S NON-CAPITAL HABEAS AMENDMENTS DO NOT APPLY RETROACTIVELY TO PETITIONS FILED PRIOR TO ITS ENACTMENT

As demonstrated by the Court's grant of certiorari in *Lindh*, there is ample reason for Supreme Court resolution of the issue whether AEDPA's restrictive amendments to 28 U.S.C. §2254 apply retroactively to non-capital habeas petitions, such as Mainiero's, which were filed before the AEDPA was enacted.[1]

Many courts have held, contrary to the Seventh Circuit's decisions below and in *Lindh v. Murphy*, 96 F.3d 856 (7th Cir. 1996) (*en banc*), that the AEDPA does not apply retroactively to such petitions. *E.g.*, *Boria v. Keane*, 90 F.3d 36 (2d Cir. 1996) cert. pending; *Edens v. Hannigan*, 87 F.3d 1109, 1111 n.1 (10th Cir. 1996); *Satcher v. Netherland*, 944 F. Supp. 1222, 1249 (E.D. Va. 1996); *Cockrum v. Johnson*, 934 F. Supp. 1417, 1422-24 (E.D. Tex. 1996). *See also Huynh v. King*, 95 F.3d 1052, 1055 n.2 (11th Cir. 1996).

Retroactive application of the AEDPA amendments

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[1] Most of the arguments in this section and Section III, B are distilled from Mr. Lindh's petition for a writ of certiorari, with credit properly going to his counsel.

also is inconsistent with the analysis mandated by this Court's decision in *Landgraf v. USI Film Products*, 511 U.S. 244 (1994). There the Court sought to resolve the "Congressional doubt concerning judicial retroactivity doctrine," *id.* at 261, by holding that legislation normally would be presumed not to apply to pending cases absent clear legislative intent to the contrary, *id.* at 280.

Just two years after *Landgraf*, Congress enacted the AEDPA. Title I of the AEDPA, entitled "Habeas Corpus Reform," contains essentially two sets of revisions of habeas law. First, Title I amends four of the preexisting habeas provisions in Chapter 153 of the Judicial Code. Second, Title I adds an entirely new chapter to the Judicial Code, Chapter 154, which consists of six provisions applicable only to capital cases. AEDPA, Pub. L. 104-132 §107(a), enacting 28 U.S.C. §§2261-2266. New §2254(d)--the revision applied by the court of appeals in this case--is contained in Chapter 153.

Presumably mindful of *Landgraf's* direction that Congress itself should "affirmatively consider[] the potential unfairness of retroactive application and determine[] that it is an acceptable price to pay for the countervailing benefits," 511 U.S. at 272-73, Congress expressly specified those pending cases to which its 1996 revisions would apply.

Specifically, Congress provided that the new capital provisions, "Chapter 154 of title 28, United States Code (as added by subsection (a) [of §107]) *shall apply to cases pending on or after the date of enactment of this Act*." AEDPA, Pub. L. 104-132 §107(c) (emphasis added). By §107(c)'s express terms, Congress identified which "cases pending on . . . the date of enactment" would be subject to the revisions in the AEDPA. Capital cases falling under Chapter 154 were included within that class of cases; non-capital cases under Chapter 153 were not.

Landgraf teaches that, if Congress has not clearly spoken concerning a statute's retroactive reach, a court must determine "whether the new provision attaches new legal consequences to events completed before its enactment." 511 U.S. at 269-70. Transforming a claim from one on which habeas relief might well have been granted to one on which relief is impossible falls squarely within this class of "retroactive effects." Such a change "affect[s] substantive rights," *id.* at 278, and "impair[s] rights a party possessed when he [filed his habeas petition]," *id.* at 280. More directly, *Landgraf* recognized that restricting a preexisting right to relief constitutes a "new legal consequence." *Id.* at 284-85 ("restricting subcontractors' rights to recover damages

from prime contractors" is "new legal consequence").

Because the court of appeals' decision on the retroactivity question conflicts with the decisions of several other federal courts, and because that courts' analysis of that important federal question is at odds with this Court's decision in *Landgraf*, this case presents the type of compelling reasons generally required for the grant of certiorari. *See* Sup. Ct. R. 10(a) & (c).

III.

SUPREME COURT REVIEW IS APPROPRIATE TO DETERMINE THE PROPER STANDARD FOR REVIEW OF A TRIAL COURT DETERMINATION THAT CERTAIN EVIDENCE MAY BE WITHHELD FROM A CRIMINAL DEFENDANT AS NOT "MATERIAL" UNDER THE STANDARDS SET FORTH IN *PENNSYLVANIA V. RITCHIE*, 480 U.S. 39 (1987)

This case also raises an important issue regarding the proper standard for review of a trial court's refusal to order disclosure to a criminal defendant of information or evidence claimed to be material and exculpatory under the Due Process Clause of the Fourteenth Amendment to the United States Constitution. This issue divided the lower courts even prior to enactment of the Antiterrorism and Effective Death Penalty

Act amendments to the federal habeas statute, and accordingly presents the paradigmatic case for resolution by this Court. *See* Sup. Ct. R. 10(a).

A. The Court of Appeals' "Abuse of Discretion" Standard Was Inappropriate Under Pre-AEDPA Law.

The court of appeals applied an "abuse of discretion" standard to Mainiero's exculpatory evidence claim. A:6-7. Indeed, that court appears to have adopted such a standard to questions of materiality under the Due Process Clause even before enactment of the AEDPA. *See United States v. Boyd*, 55 F.3d 239, 242, 245 (7th Cir. 1995); *United States v. Silva*, 71 F.3d 667, 670 (7th Cir. 1995); *United States v. Williams*, 81 F.3d 1434, 1438 (7th Cir. 1996).

The Seventh Circuit's application of that standard, however, was directly contrary to the *de novo* standard applied to review of such issues by this Court in *Kyles v. Whitley*, 514 U.S. 419, 115 S.Ct. 1555 (1995), as well as that applied by virtually every other federal court of appeals. *See, e.g., United States v. Cuffie*, 80 F.3d 514, 517 (D.C. Cir. 1996); *United States v. Payne*, 63 F.3d 1200, 1209 (2d Cir. 1995), *cert. denied,* 116 S.Ct. 1056 (1996); *United States v. Ramos*, 27 F.2d 65, 67 (3d Cir. 1994); *United States v.*

Green, 46 F.3d 461, 464 (5th Cir.), *cert. denied*, 115 S.Ct. 2629 (1995); *United States v. Phillip*, 948 F.2d 241, 250 (6th Cir. 1991), *cert. denied*, 504 U.S. 930 (1992); *Cornell v. Nix*, 976 F.2d 376, 382 (8th Cir. 1992), *cert. denied*, 507 U.S. 1020 (1993); *United States v. Bracy*, 67 F.3d 1421, 1428 (9th Cir. 1995); *United States v. Molina*, 75 F.3d 600, 602 (10th Cir.), *cert. denied*, 116 S.Ct. 2510 (1996); *United States v. Mejia*, 82 F.3d 1032, 1036 (11th Cir.), *cert. denied sub nom., Lopez v. United States*, 117 U.S. 188 (1996). Only the First Circuit appears to have applied a deferential standard of review to such issues. *See United States v. Perkins*, 926 F.2d 1271, 1276 (1st Cir. 1991) (decision concerning materiality of evidence "will ordinarily be accorded deference," but reviewing more closely where constitutional issue involved).

The *de novo* standard applied by this Court and the other circuits is the appropriate one. The stated rationale for the Seventh Circuit's discretionary standard of review in cases such as this is that:

> the effect that a particular piece of evidence is likely to have had on the outcome of a trial must be determined in light of the full context of the weight and credibility of all evidence actually presented at trial. Having personally observed the entire proceeding, the district court judge is best positioned to make this determination.

Silva, 71 F.3d at 670; *see Boyd*, 55 F.3d at 242. Yet, this Court has held that just such an evaluation with regard to "harmless error" is a purely legal determination reviewed *de novo*. *O'Neal v. McAninch*, 513 U.S. 432, 115 S.Ct. 992, 995 (1995).

The Seventh Circuit in *United States v. Baldwin*, 60 F.3d 363, 365 (7th Cir. 1995), applied a rationale similar to that in *Silva* and *Boyd* to hold that a district court's finding that a statement was voluntary is subject to deferential rather than *de novo* review on direct appeal. *See also United States v. D.F.*, 63 F.3d 671, 677 (7th Cir. 1995).[2] This Court, however, vacated both *Baldwin* and *D.F.*, and remanded them for reconsideration in light of its decision in *Ornelas v. United States*, 116 S.Ct. 1657 (1996). *See Baldwin v. United States*, 116 S.Ct. 1873 (1996); *United States v. D.F.*, 116 S.Ct. 1872 (1996).

In *Ornelas*, this Court rejected the Seventh Circuit's view in *United States v. Spears*, 965 F.2d 262 (7th Cir.), *cert. denied*, 506 U.S. 989 (1992), that a lower court's finding that given facts establish reasonable suspicion or probable cause for a warrantless search is reviewed deferentially for "clear

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[2] This Court in *Miller v. Fenton*, 474 U.S. 104, 110 (1985), had mandated *de novo* review of the same question on habeas review.

error," rather than *de novo*. Rather, the Court held that independent appellate review in such cases is consistent with precedent, will prevent unacceptably varied results based upon the interpretation of similar facts by different trial judges, is necessary if appellate courts are to maintain control of, and to clarify, the pertinent legal rules, and will tend to unify precedent, providing a more defined set of rules for the police. *Ornelas*, 116 S.Ct. at 1662-63.

Each of these factors applies with equal force to the question of materiality, although unified precedent is required not by the police but by the trial courts. *See State v. Mainiero*, 189 Wis.2d 80, 525 N.W.2d 304, 307 (Ct. App. 1994) (reviewing issue of materiality *de novo* "to ensure consistency in the scope of constitutional principles").

Finally, Mainiero notes that, contrary to the holdings in *Boyd*, et al., even the Seventh Circuit applies the *de novo* standard when reviewing the prejudice prong of the ineffective assistance of counsel test set forth in *Strickland v. Washington*, 466 U.S. 668, 688 (1984). *Jones v. Page*, 76 F.3d 831, 840 n.8 (7th Cir.), *cert. denied,* 117 S.Ct. 363 (1996); *Kubat v. Thieret*, 867 F.2d 351, 370 (7th Cir.), *cert. denied sub nom., Kubat v. Greer*, 493 U.S. 874 (1989). The prejudice prong of *Strickland* incorporates the very same

standard of materiality as does the due process analysis under *United States v. Bagley*, 473 U.S. 667 (1985). *See Kyles*, 115 S.Ct. at 1565-66.

The Seventh Circuit's "abuse of discretion" standard for reviewing the materiality of withheld evidence under the Due Process Clause thus is directly at odds not only with the decisions of this Court, but with those of virtually every other circuit as well as with its own decisions regarding the same test under the prejudice prong of *Strickland*. Even after Mainiero explained the conflict in his request for rehearing *en banc*, the court below refused to act. B:1-2. Accordingly, only this Court can bring that court back under control, as it previously had to do in *Ornelas*, *supra*.

B. The Abuse of Discretion Standard for Review of Materiality Determinations Remains Inappropriate Under the AEDPA Amendments to 28 U.S.C. §2254(d)

As amended by the AEDPA, §2254(d) provides that a habeas application "shall not be granted" with respect to a claim the state courts adjudicated on the merits

> unless the adjudication of the claim--
>
> > (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly

> established Federal law, as determined by the Supreme Court . . ..

28 U.S.C. §2254(d)(1). The court below construed this provision as requiring *de novo* review only of purely legal questions to determine if the state court cited the correct Supreme Court precedents regarding materiality, and deferential review for "abuse of discretion" regarding application of that precedent to the particular facts of this case. A:4-7. *See also Lindh v. Murphy*, 96 F.3d at 870, 877 (under AEDPA amendments, pure questions of law reviewed *de novo*, while mixed questions of law and fact reviewed deferentially).

The court of appeals' construction of the AEDPA amendments as permitting only deferential review of mixed questions of law and fact radically alters the nature of habeas review. Under the court of appeals' analysis, constitutional issues involving mixed questions of law and fact, which this Court traditionally has recognized as having only right and wrong answers and therefore subject to *de novo* review, become shades of gray concerning which even wrong answers are deemed acceptable. That view transforms the Great Writ from a substantive protection of constitutional rights to little more than a parchment barrier, guaranteeing only that state

courts mouth the right legal formula.

The court of appeals' cramped construction, moreover, does not flow easily from the statutory language. For instance, that court's limitation of the "contrary to law" portion of §2254(d)(1) to cases in which the state court misstates the controlling legal principles, A:5-6, overlooks the fact that the "contrary to" language relates not to the state court's statement of the legal rule but to its "decision."

A decision is a "conclusion of law upon facts"[3]--in lay terms, a "final and definite result of examining a question"; a "conclusion" or "resolution." It is, in other words, the result a court reaches when it applies the law to the facts.

This Court has understood that judges make "law" not only through "elaboration of constitutional principles" but also when "those principles . . . [are] applied." *Bose Corp. v. Consumer's Union*, 466 U.S. 485, 508 (1984) (citation omitted). Indeed, often "the relevant legal principle can be given meaning *only* through its application to the particular circumstances of a case." *Miller v. Fenton*, 474 U.S. 104, 114 (1985) (habeas case; emphasis added); *see Ornelas*, 116

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[3] Black's Law Dictionary 842 (6th ed. 1990) (equating "decision" and "judgment"); *see id.* at 407 ("determination arrived at after consideration of the facts, and, in legal context, law").

S.Ct. at 1662 (some "legal rules . . . acquire content only through application").

In scores of the Court's opinions, therefore, "mixed questions of law and fact" have been "ranked as issues of *law*." *Thompson v. Keohane*, 116 S.Ct. 457, 465 (1995) (emphasis added; citing numerous habeas cases). And the Court "[o]n numerous . . . occasions has set aside convictions" because, in its independent estimation, the law state courts made when they applied rules to facts was contrary to the Court's standards for such cases. *Miller*, 474 U.S. at 109 (voluntariness of confession).

The more reasonable construction of the two types of review set forth in §2254(d)(1) is that the "contrary to law" provision applies both to pure errors of "clearly established" Supreme Court case law *and* to errors in application of such case law to the facts of a particular case. The "unreasonable application" language, on the other hand, applies to situations traditionally covered by the rule in *Teague v. Lane*, 489 U.S. 288 (1989), in which there is no law to which the state decision can be "contrary." If a question is one that the Court's cases have never addressed, a state court's answer can and must stand unless it applies the Court's peripherally pertinent precedents in an "unreasonable" manner. *Cf.*

Gilmore v. Taylor, 508 U.S. 333, 351 (1993) (O'Connor, J., concurring) (if the principles on which a prisoner relies are only broadly relevant, habeas relief may not be granted under *Teague* unless the state court decision was a "begrudging or unreasonable application of those principles").

Finally, the Seventh Circuit's construction is directly contrary to that given the amendments by at least three other circuits. In each of those cases, the court granted relief on the basis of a state court's erroneous resolution of a "mixed question of law and fact"--in each case affording the petitioner plenary review under the "decision contrary to law" phrase, not "deferential" review under the "unreasonable application" phrase. *See, e.g.*, *Baylor v. Estelle*, 94 F.3d 1321 (9th Cir. 1996) (ineffective assistance of counsel), *cert. denied,* 117 S.Ct. 1329 (1997); *Dickerson v. Vaughn*, 90 F.3d 87, 90-92 (3d Cir. 1996) (voluntariness of plea); *Ayala v. Speckard*, 89 F.3d 91, 96-97 (2d Cir.) (denial of public trial), *aff'd on rehearing*, 102 F.3d 649 (2d Cir. 1996), *cert. denied,* 1997 WL 120384 (May 19, 1997).

CONCLUSION

For the reasons stated, the Court should grant a writ of certiorari to review the decision of the court of appeals.

Dated at Milwaukee, Wisconsin, May 30, 1997.

Respectfully submitted,

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APPENDIX A

In the United States Court of Appeals For the Seventh Circuit

No. 96-1740

LOUIS M. MAINIERO,

Petitioner-Appellant,

v.

EURIAL JORDAN, Administrator, Division of Probation and Parole, and JAMES E. DOYLE, Attorney General of Wisconsin,

Respondents-Appellees.

Appeal from the United States District Court
for the Eastern District of Wisconsin.
No. 95 C 703—J. P. Stadtmueller, *Chief Judge.*

ARGUED SEPTEMBER 19, 1996—DECIDED JANUARY 27, 1997

Before COFFEY, FLAUM and MANION, *Circuit Judges.*

COFFEY, *Circuit Judge.* Appellant Louis Mainiero was found guilty by a jury in a Wisconsin state court of one count of second degree sexual assault of a child in violation of Wisconsin Statutes section 948.02(2), and a misdemeanor count of trespass to a dwelling.[1] Mainiero

[1] Mainiero had been charged with two counts of sexual assault and was acquitted of the charges contained in count two. The trespass conviction is not before us.

was sentenced to six years incarceration on the sexual assault charge. The Wisconsin Court of Appeals ("appellate court") affirmed Mainiero's convictions. *State v. Mainiero*, 525 N.W.2d 304 (Wis. Ct. App. 1994). The Wisconsin Supreme Court denied review. *State v. Mainiero*, 531 N.W.2d 326 (Wis. 1995). The district court denied Mainiero's petition for a writ of habeas corpus. Mainiero appeals, arguing that the trial court denied him due process in finding that allegedly exculpatory evidence did not need to be disclosed. He also claims the appellate court deprived him of due process and equal protection in failing to address an issue that he raised before that court. We affirm.

I. Background

In March 1992, Mainiero was accused by a fifteen year old female (the "complainant") of touching her breasts, buttocks and vagina during the course of several massages[2] that he gave her over a five month period while she was employed in his home as a baby sitter. After the complainant made these allegations, her mother arranged for her admission to the psychiatric unit of Waukesha [Wisconsin] Memorial Hospital ("hospital") because she was contemplating suicide. Psychiatric records compiled during her stay in the hospital contain allegations that Mainiero had made sexual contact with her. The records also indicate that the complainant was grieving the death of a friend from leukemia during January 1992.

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[2] Mainiero testified that he and his wife had received formal instruction in various massage techniques, and that he often performed massages for men and women, including the Mainiero's baby sitters and their mothers.

Prior to trial, Mainiero moved the trial judge for *in camera* review and disclosure of the hospital's psychiatric records pertaining to complainant's treatment. The trial court, after reviewing the psychiatric records *in camera*, declined to reveal any part of them to Mainiero for his defense. The trial judge orally denied Mainiero's motion, issuing a more detailed written statement after trial in which he found that the

> overall theme of the reports deals with her treatment [for] depression, self respect issues and so on, and the only cause that is recited in those reports pertains to the allegations of sexual assaults made against Mr. Mainiero. There is reference in the report that [the complainant] may also have been sad or grieving the death of a friend from leukemia during the month of January 1992, but the primary focus of the reports again deals with the sexual assault allegations and her inability to cope with ramifications of that event. . . . It is further the court's review of those documents that in reference to the sexual assault, the court was not aware of any contradictory statements from the information gleaned in the criminal complaint and the nature of the charges. Based on that review of the document, it is the court's opinion that there is nothing contained therein that would be reasonable and necessary for a presentation of the defense's case or cross examination of [the complainant].

Mainiero appealed the trial judge's denial of his motion to disclose the psychiatric records. The appellate court, referring to the records in question, "conclud[ed] that . . . [they] do not contain information that probably would have changed the outcome of the trial." *Mainiero*, 525 N.W.2d at 308. Mainiero filed a petition for a writ of habeas corpus with the district court which denied the writ. The district court, after reviewing the psychiatric

records, agreed with the trial judge and the appellate court that "[t]here is nothing [in the psychiatric records] to undermine confidence in the outcome of Mainiero's trial." *Mainiero v. Jordan*, No. 95-C-703, slip op. at 10 (E.D. Wis. March 6, 1996).

Mainiero appeals the district court's denial of his habeas corpus petition, arguing that the trial judge denied him due process by failing to disclose allegedly exculpatory information contained in the psychiatric records, wherein the complainant was reported to have grieved the death of a friend from leukemia. Mainiero also maintains that the appellate court denied him due process and equal protection by declining to address in its written opinion whether the trial court improperly admitted extrinsic evidence of his character.

II. Discussion

A. Hospital Records

Mainiero argues that the trial judge's decision not to disclose parts of the complainant's psychiatric records denied him due process of law because the records are contrary to the complainant's trial testimony and rebut the primary, if not the sole, evidence in support of his sexual assault conviction. Habeas corpus review of state court judgments is circumscribed by section 2254 of Title 28 and the recently-enacted amendments to the same contained in the Antiterrorism and Effective Death Penalty Act of 1996,[3] which provides in relevant part:

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[3] Pub. L. 104-132, 110 Stat. 1214. Under *Lindh v. Murphy*, 96 F.3d 856 (7th Cir. 1996) (*en banc*), the amendments to section 2254 are applicable to cases, such as the instant controversy, that were pending at the time of enactment of the Antiterrorism and Effective Death Penalty Act of 1996.

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—
>
> > (1) resulted in a decision that was *contrary to*, or involved an unreasonable application of, *clearly established* Federal law, as determined by the Supreme Court of the United States . . . (emphasis added).

The appellate court began its analysis by stating that under the Supreme Court's decision in *Pennsylvania v. Ritchie*, 480 U.S. 39, 58 (1987), it had to determine "whether the psychiatric records contain[ed] information material to [Mainiero] that 'probably would have changed the outcome of [his] trial.'" *Mainiero*, 525 N.W.2d at 307 (quoting *Ritchie*, 480 U.S. at 58). Quoting another decision of the Supreme Court, the appellate court observed that "evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome." *Id.* at 57 (quoting *United States v. Bagley*, 473 U.S. 667, 682 (1985)).

The appellate court issued its opinion affirming Mainiero's conviction on November 2, 1994. At this time, the aforementioned Supreme Court cases were the prevailing precedents defining "material" for purposes of determining when the government, consistent with due process, must turn over evidence in its possession that is both favorable to the accused and "material either to guilt or to punishment." *Brady v. Maryland*, 373 U.S. 83,

87 (1963).[4] The appellate court's decision, therefore, was not "contrary to" "clearly-established," relevant Supreme Court precedent. Under the new provision in section 2254, we must also determine if the appellate court's decision involved an "unreasonable application" of the foregoing Supreme Court precedents to the facts.

We review the appellate court's findings under an abuse of discretion standard. *United States v. Williams*, 81 F.3d 1434, 1438 (7th Cir. 1996); *United States v. Silva*, 71 F.3d 667, 670 (7th Cir. 1995); *United States v. Boyd*, 55 F.3d 239, 242 (7th Cir. 1995). The appellate court, upon review, agreed with the trial judge that the only cause identified by the complainant's treating psychiatrists for her depression and suicidal thoughts was the alleged sexual assault by Mainiero. *Mainiero*, 525 N.W.2d at 308. This being so, it was not unreasonable for the district court to find, relying upon the decision of the appellate court, that the failure to disclose "two or three passing references to the death of the complainant's friend in the hundred-plus pages of the records,"

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[4] The recent opinion of the Court in *Kyles v. Whitley*, 115 S. Ct. 1555 (1995) was issued subsequent to the appellate court's decision and is thus irrelevant to habeas corpus review in this case. In *Kyles*, the Court stated that the *Bagley* standard of materiality "does not require demonstration by a preponderance of evidence that disclosure of the suppressed evidence would have resulted ultimately in the defendant's acquittal," *id.* at 1565-66, but rather questions whether "in [the] absence [of the undisclosed evidence] he received a fair trial, understood as a trial resulting in a verdict worthy of confidence." *Id.* at 1566. Consideration of *Kyles* would not change our conclusion in the instant case that the psychiatric records were immaterial. Even in the absence of the complainant's statements made during her psychiatric treatment (that for a time she was grieving the death of a friend from leukemia) we conclude, for reasons stated in the body of this opinion, that Mainiero received a fair trial and that the verdict is worthy of confidence.

Mainiero, slip op. at 10, did not undermine confidence in the outcome of the trial. Cross-examination of the complainant concerning her references to the death of her friend would not *necessarily* have yielded any testimony exculpatory to Mainiero even if the complainant had admitted that her friend's death was a cause of her depression. Even though complainant may have testified that her mental health problems were attributable to more than one factor, this would not serve to undercut her allegations against Mainiero that he repeatedly made sexual contact with her.

Because Mainiero has not established that disclosure of the complainant's psychiatric records would have affected the outcome of his trial, the district court's denial of his petition for a writ of habeas corpus must be affirmed. The appellate court did not violate Mainiero's due process rights when it concluded that disclosure of the psychiatric records (reporting what the district court found to be "passing references" pertaining to the complainant's grief over the death of a friend) would not have affected the jury's verdict. Accordingly, the appellate court did not engage in an "unreasonable application" of prevailing Supreme Court precedent.

B. Appellate Court's Alleged Failure to Address an Issue

Mainiero submits that the appellate court denied him due process and equal protection by failing to address an issue raised in his brief before that court—whether the trial court improperly admitted extrinsic evidence concerning his character, in violation of a Wisconsin statute governing the admissibility of evidence. Mainiero claims the appellate court departed from the general practice of at least "summarily" addressing all issues raised on appeal. This is a misstatement of judicial practice in Wisconsin and the law. Wisconsin appellate courts need not address all issues:

> [A]n appellate court is not a performing bear, required to dance each and every tune played on an appeal. . . . Any of the . . . issues raised and not discussed . . . can be deemed to lack sufficient merit or importance to warrant individual attention.

State v. Waste Management of Wis., Inc., 261 N.W.2d 147, 151 (Wis. 1978); *see also Schapiro v. Security Sav. & Loan*, 441 N.W.2d 241, 245 n.4 (Wis. Ct. App. 1989); *Brandmiller v. Arreola*, 525 N.W.2d 353, 356 (Wis. Ct. App. 1994). Moreover, "[p]rocedural fairness does not require an appellate court to discuss every issue raised by an appellant . . . ." *Kairys v. I.N.S.*, 981 F.2d 937, 940 (7th Cir. 1992).

Mainiero points us to unavailing precedents.[5] It is true that the United States Supreme Court has held that *if* a state chooses to provide an appeal from a criminal conviction (which Wisconsin does provide[6]) it may not deprive an inmate of the type of appeal generally afforded others convicted of a crime, *Dowd v. United States*, 340 U.S. 206 (1950), deny the indigent an appeal for his failure to pay for a transcript of trial proceedings, *Griffin v. Illinois*, 351 U.S. 12 (1955), effectively discriminate against the indigent by not affording him counsel, *Douglas v. California*, 372 U.S. 353 (1963), impose a "double-bond" requirement that arbitrarily denies an appeal to poor tenants, *Lindsay v. Normet*, 405 U.S. 56 (1972), or deny an appellant who is afforded an appeal as of right, the effective assistance of counsel, *Evitts v.*

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[5] Because the appellate court did not adjudicate this second issue on the merits, the amendments to section 2254 mentioned above (prohibiting the granting of a writ of habeas corpus so long as Supreme Court precedent was not unreasonably applied by the state court) are not applicable.

[6] WIS. CONST. art I, § 21; Wis. Stat. § 974.02.

Lucey, 469 U.S. 387 (1985).[7] We fail, however, to understand how these cases support Mainiero's claim. The appellate court afforded Mainiero the type of appeal provided to others convicted of a crime, and it did not discriminate, even in effect, against Mainiero because of his status as a member of a protected class, because of indigence or for any other reason. Mainiero, therefore, was deprived of neither due process nor equal protection.

III. Conclusion

Mainiero failed to demonstrate that the appellate court deprived him of due process in finding that psychiatric reports of the complainant grieving the death of her friend were immaterial. He has also not established that the appellate court unlawfully discriminated against him in declining to address the admissibility, under Wisconsin law, of extrinsic evidence concerning his character. The decision of the district court denying Mainiero's petition for a writ of habeas corpus is AFFIRMED.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

[7] Ironically, Mainiero relies upon *Evitts*, even though this case holds that effective assistance of counsel does not require counsel to "advance *every* argument, regardless of merit, urged by the appellant." *Evitts*, 469 U.S. at 394. It would necessarily follow that the appellate court does not need to address every argument, regardless of merit, urged by the appellant.

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APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

March 4, 1997

Before

Hon. JOHN L. COFFEY, Circuit Judge
Hon. JOEL M. FLAUM, Circuit Judge
Hon. DANIEL A. MANION, Circuit Judge

No. 96-1740

LOUIS M. MAINIERO,
Petitioner-Appellant

v.

EURIAL JORDAN, Administrator,
Division of Probation and Parole,
and JAMES E. DOYLE, Attorney
General of Wisconsin

ORDER

On consideration of the petition for rehearing and suggestion for rehearing en banc filed in the above-entitled cause by petitioner-appellant Louis M. Mainiero, no judge in active service has requested a vote thereon, and all of the judges on the original panel have voted to deny a rehearing.

Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing with suggestion of rehearing en banc is DENIED.

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

LOUIS M. MAINIERO,

Petitioner,

v. Case No. 95-C-703

EURIAL K. JORDAN, Administrator, Division of Probation and Parole, and JAMES E. DOYLE, Attorney General of Wisconsin, **DECISION AND ORDER**

Respondents.

APPEARANCES:

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On June 30, 1995, Louis M. Mainiero filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. challenging his February 25, 1993 conviction in Wisconsin state court. After preliminary consideration under Rule 4 of the Federal Rules Governing Section 2254 Cases, this court directed the respondents to file an answer to the petition. Mainiero's petition is now fully briefed and ready for decision.

I. BACKGROUND

By criminal complaint filed on April 15, 1992, Mainiero was charged with two counts of sexual contact with a person under sixteen years of age in violation of Wis. Stat. § 948.02(2) (Count 1 -- contact with breasts; Count 2 contact with vaginal area), and one misdemeanor count of trespass to a dwelling in violation of Wis. Stat. § 943.14 (Count 3). The case proceeded to jury trial on January 19, 1993, in Waukesha County Circuit Court. The charges arose out of contact Mainiero had with his fifteen-year-old baby-sitter, who alleged that he had touched her breasts and vagina while giving her a massage. Mainiero testified that he and his wife had received certification in a particular massage technique, and that he often performed such massages for coworkers, friends, and other baby-sitters. The jury found Mainiero guilty on Counts 1 and 3, and not guilty on Count 2. On

February 25, 1993, Mainiero was convicted and sentenced to six years incarceration and a consecutive two-year term of probation.

Mainiero appealed his convictions, and the Wisconsin Court of Appeals affirmed. *State v. Mainiero,* 525 N.W.2d 304 (Wis. Ct. App. 1994). The Wisconsin Supreme Court denied review. *State v. Mainiero,* 531 N.W.2d 326 (Wis. 1995).

II. DISCUSSION

An application for a writ of habeas corpus may be granted only on the grounds that the petitioner "is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a). In other words, federal habeas corpus jurisdiction is limited to claims of violations of federal law. *Brewer v. Aiken,* 935 F.2d 850, 854 (7th Cir. 1991). Before considering the petitioner's claims, however, the court must determine whether the petitioner provided the state courts "a full and fair opportunity to review the petitioner's claims through its own judicial processes before asserting federal review." *Farrell v. Lane,* 939 F.2d 409, 410 (7th Cir.), *cert. denied, Farrell v. McGinnis,* 502 U.S. 944 (1991). In making such a determination, "a district court must make two inquiries -- whether the petitioner exhausted

all available state remedies and whether the petitioner raised all his claims during the course of the state proceedings." *Henderson v. Thieret,* 859 F.2d 492, 496 (7th Cir. 1988), *cert. denied, Henderson v. Greer,* 490 U.S. 1009 (1989). "If the answer to either of these inquiries is 'no,' the petition is barred either for a failure to exhaust state remedies or for a procedural default." *Henderson*, 859 F.2d at 496.

The court's review of the merits of the petition is limited by statute: the court must presume that the state court's findings of fact are correct if the findings are made after a hearing on the merits and are fairly supported by the record, with some exceptions. 28 U.S.C. §2254(d). Questions of law, or mixed questions of law and fact, of course, are not given the same presumption of correctness and are subjected to a *de novo* standard of review. *Brewer v. Aiken,* 935 F.2d at 855.

Here, Mainiero raises two issues in his petition: (1) the trial court's refusal to disclose the complainant's exculpatory psychiatric records violated Mainiero's rights to due process and a fair trial, and (2) the Wisconsin Court of Appeal's failure to address an issue raised by Mainiero on appeal violated Mainiero's due process right to an appeal and his right to equal protection of the laws.

A. Complainant's Psychiatric Records

After telling a school social worker that Mainiero had abused her, the complainant was admitted to the Waukesha Memorial Hospital psychiatric unit. Mainiero requested disclosure of the complainant's psychiatric records to the extent that they were exculpatory or reflected prior statements of the complainant. The trial court conducted an in camera review of the records and refused to disclose any part of them to Mainiero. The trial court informed both parties of its decision in open court, but later dictated a more detailed decision in chambers. This dictated decision was not made available to the parties until it was transcribed after trial. In its dictated decision, the trial court concluded that the primary focus of the complainant's treatment was the alleged sexual abuse, but also noted that the records indicated that the complainant "may also have been sad or grieving the death of a friend from leukemia during the month of January, 1992," shortly before the alleged abuse occurred.

On appeal, as here, Mainiero argued that the trial court's refusal to disclose the complainant's psychiatric records violated his rights to due process and a fair trial. He contended that it was fundamentally unfair to permit the state to rely on an inference that the complainant's hospitalization was caused by the sexual assault (thus indirectly corroborating

her account), while denying him the opportunity to challenge the basis for that inference, especially in light of the trial court's disclosure of the contemporaneous death of the complainant's friend. The Wisconsin Court of Appeals analyzed the issue under the definition of materiality in *Pennsylvania v. Ritchie,* 480 U.S. 39 (1987):

> "[E]vidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome." *Ritchie,* 480 U.S. at 57 (quoting *United States v. Bagley,* 473 U.S. 667, 682 (1985) (plurality opinion)). Findings of fact made by a trial court in determining whether information in the records is material are reviewed under the clearly erroneous standard. *State v. Shiffra,* 499 N.W.2d 719, 721 (Wis. Ct. App. 1993). However, to ensure consistency in the scope of constitutional protections, we independently apply the constitutional principles involved to the facts as found by the trial court. *State v. Maday,* 507 N.W.2d 365, 369 (Wis. Ct. App. 1993).
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> . . . .
>
> The trial court found that the only cause of the complainant's emotional state recited in the reports pertained to the allegations of sexual assault made against

Mainiero. Based on this finding, the court opined that "there is nothing contained therein that would be reasonable and necessary for a presentation of the defense's case or cross examination of [the complainant]." We have independently reviewed the records and conclude that the trial court's factual findings are not clearly erroneous and that the records do not contain information that probably would have changed the outcome of the trial.

Mainiero places a great deal of emphasis on the trial court's remark that the complainant may have also been distraught over the recent death of her friend. Based upon our review of the records, we cannot conclude that there is a reasonable probability that the result of the trial would have been different had this been disclosed to the defense. As the trial court indicated, the only cause identified by the complainant's treating professionals for her depression and suicidal ideations was the alleged sexual assault. This was the entire focus of her stay and treatment at the psychiatric unit.

Mainiero also contends that allowing the State to use evidence of the complainant's hospitalization while denying him access to the psychiatric records was fundamentally unfair, relying on our decision in *Maday*. In *Maday*, we recognized that a defendant's right to a fair trial must be balanced against the consequential invasion of the victim's privacy and the potential harm to the victim. *Maday*,

> 507 N.W.2d at 371. We conclude that Mainiero's interest in a fair trial was appropriately protected by the trial court's in camera review of the complainant's psychiatric records. *See Ritchie*, 480 U.S. at 60.
>
> . . . .
>
> Further, . . . responsive mechanisms such as cross-examination and argument were sufficient in this case to guarantee Mainiero a fair trial. Here, the State offered testimony by the complainant that she entered the hospital for psychiatric treatment for depression related to the alleged sexual assault. The State did not rely on any expert testimony, nor did it rely on or introduce any portion of the complainant's records. Therefore, nothing precluded Mainiero from effectively challenging the State's cause and effect theory through cross-examination of the complainant. Mainiero's counsel could have asked the complainant if there were any other reasons why she might have been depressed and suicidal at the time she was admitted to the psychiatric unit. If after her answer the trial court believed that information in her psychiatric records was material to the fairness of the trial, it would have been obligated to release such information. *Ritchie*, 480 U.S. at 60. Therefore, we cannot conclude that Mainiero was deprived of a level playing field.

Mainiero, 525 N.W.2d at 307-09 (parallel citations and

footnote omitted) (alterations in original).

Mainiero asks this court to conduct the same kind of analysis as did the Wisconsin Court of Appeals, that is, to independently review the complainant's psychiatric records to determine whether they contain material evidence. The respondents argue that Mainiero is not entitled to such a review, as the records constituted pretrial discovery, and alternatively, were never in the possession of the state. Mainiero counters that the trial court's in camera review took place immediately before trial and that the prosecutor indicated to Mainiero's counsel that she had possession of the records and had reviewed their contents. For purposes of my analysis, I will assume, based on the parties' filings and my own review of the record, that the records were not involved only in pretrial discovery in this case, and that the state did have them in its possession.

In *Pennsylvania v. Ritchie*, the defendant was charged with sexual offenses against his minor daughter. A state agency investigated the matter, and the defendant sought disclosure of the agency's records. The Supreme Court reiterated that the government must disclose to the defense "evidence in its possession that is both favorable to the accused and material to guilt or punishment." *Ritchie*, 480 U.S. at 57. Material evidence is that which gives rise to "a

reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome." *Ritchie*, 480 U.S. at 57. The Court held that the materiality determination belonged to the trial court, not the defendant:

> We find that Ritchie's interest (as well as that of [Pennsylvania]) in ensuring a fair trial can be protected fully by requiring that the [agency's] files be submitted only to the trial court for *in camera* review. Although this rule denies Ritchie the benefits of an "advocate's eye," we note that the trial court's discretion is not unbounded. If a defendant is aware of specific information contained in the file . . ., he is free to request it directly from the court, and argue in favor of its materiality. Moreover, the duty to disclose is ongoing; information that may be deemed immaterial upon original examination may become important as the proceedings progress, and the court would be obligated to release information material to the fairness of the trial.

Ritchie, 408 U.S. at 60.

Here, the trial court conducted a proper in camera review of the complainant's psychiatric records, thus satisfying *Ritchie*'s requirement. The only question for this court is whether the trial court's determination that the

records contained no material evidence was erroneous.

Having reviewed the complainant's psychiatric records, I agree with the trial court and the court of appeals that the information contained in the records is immaterial. There is nothing to undermine confidence in the outcome of Mainiero's trial. Although there are perhaps two or three passing references to the death of the complainant's friend in the hundred-plus pages of the records, these references do not give rise to a reasonable probability that had they been disclosed to the defense, the outcome of the trial would have been different.

I also note, as did the Wisconsin Court of Appeals, that Mainiero's counsel simply could have asked the complainant if there were any other possible reasons for her depression. In fact, the prosecutor asked the complainant on direct examination, "Were you having any other particular problems at this time that made you feel suicidal?" to which the complainant answered, "Some of my friends didn't approve of a guy that I liked, but that was only because they saw I was acting differently and they thought he was the reason." Mainiero's counsel made no effort to follow up on this additional reason (which also was mentioned once or twice in the complainant's psychiatric records) on cross-examination.

The bottom line is that Mainiero's argument that he could have used the references to the friend's death to undermine the state's indirect corroboration of the complainant's allegations by the fact of her admittance to the psychiatric ward simply is not persuasive in light of the actual content of the records. Without conducting a sufficiency-of-the-evidence analysis, *see Kyles v. Whitley,* ___ U.S. ___, ___, 115 S.Ct. 1555, 1566 (1995), it is apparent that this small bit of favorable evidence cannot "reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." *Kyles,* ___ U.S. at ___, 115 S.Ct. at 1566.

B. Appellate Court's Failure to Address Issue

Mainiero's second argument is that the Wisconsin Court of Appeal's failure to address an issue raised by Mainiero on appeal violated Mainiero's due process right to an appeal and his right to equal protection of the laws.

State appellate courts, as do federal appellate courts, address those issues which they deem nonfrivolous or dispositive. Often, they do not trouble themselves with the rest. As the Wisconsin Supreme Court stated, "An appellate court is not a performing bear, required to dance to each and every tune played on an appeal. . . . Any . . . issues raised

and not discussed . . . can be deemed to lack sufficient merit or importance to warrant individual attention." *State v. Waste Management*, 261 N.W.2d 147, 151 (Wis.), *cert. denied*, 439 U.S. 865 (1978).

As Mainiero contends, the Wisconsin Court of Appeals did not address an issue fully briefed by both parties in this case. One could assume, then, that the appellate court did not consider the issue important. Mainiero attempts to convince me that the issue, which is one of state law, is not frivolous. Mainiero postures the appellate court's failure to address the issue in terms of constitutional law -- namely, that he was denied a meaningful appeal. It is apparent, however, that although the appellate court may have chosen not to address one issue, it certainly did not give Mainiero's appeal short shrift. This is evidenced by the court's careful attention to the other issues raised by Mainiero on appeal (indeed, the court's opinion numbers some ten pages in the regional reporter).

I am unconvinced that it is the role of this court to review any issue, especially one of state law, not addressed by a state appellate court to determine whether the issue was indeed frivolous or unimportant. Mainiero offers no authority to indicate that this is a proper function of a habeas court. In the absence of such authority or some suggestion that

Mainiero's entire appeal was meaningless, I will decline Mainiero's invitation to delve into the merits of an issue of state law.

III. CONCLUSION

For the reasons stated above, I will dismiss Mainiero's petition for a writ of habeas corpus.

Accordingly,

IT IS ORDERED that Mainiero's petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 be and the same is hereby **DISMISSED**.

The clerk is directed to enter judgment accordingly.

Dated at Milwaukee, Wisconsin, this 6th day of March, 1996.

BY THE COURT:

/s/

J.P. Stadtmueller
U.S. District Judge

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APPENDIX D

STATE OF WISCONSIN
IN SUPREME COURT

Case No. 93-1523

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

LOUIS M. MAINIERO,

Defendant-Appellant-Petitioner.

January 17, 1995

A petition for review pursuant to sec. 808.10, Stats., having been filed on behalf of defendant-appellant-petitioner, Louis M. Mainiero, and considered by the court,

IT IS ORDERED that the petition for review is denied, without costs.

STATE of Wisconsin, Plaintiff-Respondent,

v.

Louis M. MAINIERO, Defendant-Appellant.†

Court of Appeals

No. 93-2486-CR. Oral argument July 27, 1994.—Decided November 2, 1994.

(Also reported in 525 N.W.2d 304.)

RESEARCH REFERENCES

Am Jur 2d, Evidence §§ 249 et seq., 267, 320.
See ALR Index under Criminal Law; Evidence; Evidence Rules.

1. **Criminal Law and Procedure § 275°—materiality of evidence—defined.**

   Evidence is material only if there is reasonable probability that, had evidence been disclosed to defense, result of proceeding would have been different.

2. **Criminal Law and Procedure § 275°—materiality of evidence—reasonable probability—defined.**

   Reasonable probability is probability sufficient to undermine confidence in outcome.

3. **Appeal and Error § 632°—findings of fact—review—clearly erroneous standard.**

   Findings of fact made by trial court in determining whether information in records is material are reviewed under clearly erroneous standard, although to ensure consistency in scope of constitutional protections, court independently

†Petition to review denied.

°See Callaghan's Wisconsin Digest, same topic and section number.

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applies constitutional principles involved to facts as found by trial court.

4. **Criminal Law and Procedure § 275*—admission of evidence—in camera review—defendant's interest in fair trial.**

In appeal of conviction for sexual contact with person under age of 16, trial court's refusal to disclose complainant's psychiatric records did not deny defendant due process and fair trial, since defendant's interest in fair trial was appropriately protected by trial court's in camera review of complainant's psychiatric records.

5. **Criminal Law and Procedure § 780*—evidentiary issues—standard of review.**

When reviewing evidentiary issues, test is not whether court of appeals agrees with ruling of trial court, but whether trial court exercised discretion in accordance with accepted legal standards and in accordance with fact of record.

6. **Criminal Law and Procedure § 780*—evidentiary ruling—reasonable basis—evidence in record.**

Court of appeals will not find misuse of discretion if there is reasonable basis for court's determination, although there should be evidence in record to indicate that trial court exercised its discretion and provided basis for its discretionary determination.

7. **Criminal Law and Procedure § 769*—discretionary ruling—review—basis for upholding.**

Where record inadequately sets forth trial court's reasoning for its ruling, court of appeals independently reviews record to determine whether it provides basis for court's exercise of discretion, and looks for reasons to sustain trial court's discretionary ruling, which will be upheld if record contains facts which would support decision had court fully exercised its discretion.

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*See Callaghan's Wisconsin Digest, same topic and section number.

8. **Criminal Law and Procedure § 780*—relevancy—cross-examination—test.**

Proper standard for test of relevancy on cross-examination is whether answer sought will be useful to trier of fact in appraising credibility of witness and evaluating probative value of direct testimony.

9. **Criminal Law and Procedure § 275*—discretionary determination—relevancy of cross-examination—reasonable determination.**

In appeal from conviction for sexual contact with person under age of 16, where, on both direct and cross-examination, defendant was questioned about statement he made to complainant that he had "open relationship" with his wife, state's questions regarding definition of terms and whether he had "open relationship" with other woman could have reasonably been determined by trial court to be directed at defendant's credibility regarding his description of "open relationship," and record provided basis for court's discretionary determination regarding relevancy of cross-examination.

10. **Criminal Law and Procedure § 780*—evidentiary determination—discretionary—question on review.**

Trial court's evidentiary determinations are discretionary in nature and relevant question is not whether court of appeals would have permitted testimony in question, but rather whether trial court exercised its discretion in accordance with accepted legal standards and in accordance with facts of record.

11. **Criminal Law and Procedure § 311*—character evidence—introduction—limitation.**

State's introduction of character evidence is limited to that which rebuts character trait being established (Stats § 904.04(1)(a)).

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*See Callaghan's Wisconsin Digest, same topic and section number.

12. **Criminal Law and Procedure § 780*—admission of evidence—unfair prejudice—tendency to influence outcome.**

Unfair prejudice results where proffered evidence, if introduced, would have tendency to influence outcome by improper means or if it causes jury to base its decision on something other than established propositions in case.

13. **Criminal Law and Procedure § 780*—admissibility of evidence—question on appeal.**

Issue is not whether court of appeals, ruling initially on admissibility of evidence, would have permitted it to come in or whether court agrees with trial court's ruling, but rather whether appropriate discretion was exercised and there was reasonable basis for court's determination.

14. **Criminal Law and Procedure § 780*—admissibility of evidence—trial court's discretion—error of law.**

While admissibility of evidence is generally question addressed to trial court's discretion, trial court misuses discretion if it makes error of law.

15. **Criminal Law and Procedure § 294*—recent fabrication—prior consistent statement—admissibility.**

Allegation that complainant was lying, standing alone, is not sufficient to render prior consistent statement admissible, where there was no express or implied charge of recent fabrication or improper influence or motive.

16. **Criminal Law and Procedure § 743*—inadmissible hearsay—harmless error—no contribution to conviction.**

Where trial court erroneously permitted inadmissible hearsay evidence, in form of testimony regarding complainant's prior consistent statements, error was harmless where there was no reasonable possibility that error contributed to conviction.

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*See Callaghan's Wisconsin Digest, same topic and section number.

APPEAL from judgments of the circuit court for Waukesha County: KATHRYN W. FOSTER, Judge. *Affirmed.*

On behalf of the defendant-appellant, there were briefs by *Stephen M. Glynn* and *Robert R. Henak* of *Shellow, Shellow & Glynn, S.C.* of Milwaukee. There were oral arguments by *Stephen M. Glynn.*

On behalf of the plaintiff-respondent, there was a brief by *James E. Doyle*, attorney general, and *Marguerite M. Moeller*, assistant attorney general. There were oral arguments by *Marguerite M. Moeller.*

Before Anderson, P.J., Brown and Snyder, JJ.

SNYDER, J. Louis M. Mainiero appeals from judgments of conviction for sexual contact with a person under the age of sixteen and criminal trespass to a dwelling. Mainiero offers three arguments on appeal: (1) the trial court's refusal to disclose the complainant's psychiatric records denied him due process and a fair trial, (2) the trial court improperly admitted irrelevant evidence to suggest his bad character for sexual morality which was highly prejudicial, and (3) the trial court improperly permitted the State to submit evidence of the complainant's prior consistent statements. We are unpersuaded by Mainiero's arguments and affirm.

I. FACTS

Mainiero was charged with two counts of sexual assault in violation of § 948.02(2), STATS., for touching the breasts and vagina of his children's fifteen-year-old babysitter. Mainiero was also charged with one misdemeanor count of trespass to a dwelling contrary to § 943.14, STATS., arising out of an incident where Mainiero entered the babysitter's home looking for her

after she made the sexual assault allegations against him. The jury found Mainiero guilty of sexual contact with the babysitter's breasts and the trespass charge, but not guilty of sexual contact with her vagina. The trial court sentenced him to six years incarceration on the sexual contact charge and a consecutive two-year term of probation on the misdemeanor trespass. Mainiero appeals from the judgments of conviction.

Based upon the lack of witnesses or physical evidence, this case centered around the credibility of the complainant's and Mainiero's testimony. In March of 1992, the fifteen-year-old complainant alleged that Mainiero had been improperly touching her on many occasions during the five-month period since she began babysitting for Mainiero's children. Specifically, the complaint alleged that on February 9, 1992, Mainiero touched her breasts while giving her a massage and that he subsequently began touching her buttocks and vagina with his hand. After making these allegations, the complainant was admitted to the Waukesha Memorial Hospital psychiatric unit because she was emotionally distraught and claimed to be suicidal.

Mainiero vigorously denied any improper sexual contact with the babysitter. He testified that as a hobby, he and his wife had received formal instruction in various massage techniques, including full-body massages where the recipient is fully or partially unclothed underneath a sheet. He stated that he often performed such massages for men and women, including the Mainieros' babysitters and their mothers, without any previous allegations of sexual impropriety. We will recite additional relevant facts as necessary in our discussion of the issues.

II. PSYCHOLOGICAL EVIDENCE

Prior to trial and pursuant to Mainiero's motion, the trial court performed an in camera review of the complainant's psychiatric records related to her treatment at Waukesha Memorial Hospital. Mainiero requested disclosure of the records to the extent that they were exculpatory or reflected prior statements of the complainant. *See* § 971.24, STATS. Mainiero also filed a motion in limine to bar the State from introducing evidence concerning the complainant's hospitalization in the psychiatric unit, arguing that such information was irrelevant and unfairly prejudicial. The trial court denied Mainiero's motion and, after reviewing the psychiatric records, refused to disclose any part of them to Mainiero for his defense. The trial court informed both parties of its decision in open court, but at some later point dictated a more detailed decision in chambers.

The trial court's dictated decision was not available to the parties until it was transcribed after trial for purposes of this appeal. The trial court concluded that the reports indicated that the complainant was depressed and suffering from posttraumatic stress disorder caused by the alleged sexual assault. Although the court concluded that the primary focus of the reports dealt with the ramifications of the sexual assault allegations, the court also noted that the complainant "may also have been sad or grieving the death of a friend from leukemia during the month of January, 1992."[1]

[1] The trial court concluded in relevant part:

> That [the complainant] was hospitalized for attempted suicide or suicidal ideations; that she was ultimately diagnosed as number one, being depressed, and number two, as suffering from post-

On appeal, Mainiero argues that the trial court's refusal to disclose the complainant's psychiatric records denied him his constitutional rights to due process and a fair trial. He contends that it was fundamentally unfair to permit the State to rely on an inference that the complainant's hospitalization was caused by the sexual assault while denying him the opportunity to challenge the basis for that inference. Mainiero argues that this is especially true in light of the posttrial revelation by the court that the complainant may have been grieving the death of a friend at the same time she was hospitalized, thereby presenting an alternative to the State's cause and effect theory.

The issue to be decided is whether the trial court erred in refusing to release the complainant's psychiatric records to Mainiero following its in camera review. Therefore, we must determine whether the records contain information material to the defendant that "probably would have changed the outcome of [Mainiero's] trial." *Pennsylvania v. Ritchie*, 480 U.S. 39, 58 (1987).

traumatic stress disorder. The overall theme of the reports deals with her treatment with that depression, self-respect issues and so on, and the only cause that is recited in those reports pertains to the allegations of sexual assaults made against Mr. Mainiero. There is reference in the report that [the complainant] may also have been sad or grieving the death of a friend from leukemia during the month of January, 1992, but the primary focus of the reports again deals with the sexual assault allegations and her inability to cope with the ramifications of that event. . . . It is further the court's review of those documents that in reference to the sexual assault, the court was not aware of any contradictory statements from the information I gleaned in the criminal complaint and the nature of the charges. Based on that review of the documents, it is the court's opinion that there is nothing contained therein that would be reasonable and necessary for a presentation of the defense's case or cross examination of [the complainant].

[1-3]

"[E]vidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome." *Ritchie*, 480 U.S. at 57 (quoting *United States v. Bagley*, 473 U.S. 667, 682 (1985) (plurality opinion)). Findings of fact made by a trial court in determining whether information in the records is material are reviewed under the clearly erroneous standard. *State v. Shiffra*, 175 Wis. 2d 600, 605, 499 N.W.2d 719, 721 (Ct. App. 1993). However, to ensure consistency in the scope of constitutional protections, we independently apply the constitutional principles involved to the facts as found by the trial court. *State v. Maday*, 179 Wis. 2d 346, 353, 507 N.W.2d 365, 369 (Ct. App. 1993).

Mainiero contends that the psychiatric records were material to his defense because: (1) they contain prior statements of the complainant which may be inconsistent with her statements made in court regarding the sexual assault, and (2) they contain exculpatory information inconsistent with the State's cause and effect argument. We disagree.

The trial court found that the only cause of the complainant's emotional state recited in the reports pertained to the allegations of sexual assault made against Mainiero. Based on this finding, the court opined that "there is nothing contained therein that would be reasonable and necessary for a presentation of the defense's case or cross examination of [the complainant]." We have independently reviewed the records and conclude that the trial court's factual findings are not clearly erroneous and that the records do

not contain information that probably would have changed the outcome of the trial.

Mainiero places a great deal of emphasis on the trial court's remark that the complainant may have also been distraught over the recent death of her friend. Based upon our review of the records, we cannot conclude that there is a reasonable probability that the result of the trial would have been different had this been disclosed to the defense. As the trial court indicated, the only cause identified by the complainant's treating professionals for her depression and suicidal ideations was the alleged sexual assault. This was the entire focus of her stay and treatment at the psychiatric unit.

Mainiero also contends that allowing the State to use evidence of the complainant's hospitalization while denying him access to the psychiatric records was fundamentally unfair, relying on our decision in *Maday*. In *Maday*, we recognized that a defendant's right to a fair trial must be balanced against the consequential invasion of the victim's privacy and the potential harm to the victim. *Maday*, 179 Wis. 2d at 358, 507 N.W.2d at 371. We conclude that Mainiero's interest in a fair trial was appropriately protected by the trial court's in camera review of the complainant's psychiatric records. *See Ritchie*, 480 U.S at 60.

In *Maday*, the State proposed to present testimony from five expert witnesses that the behaviors exhibited by the complainants of sexual assault were consistent with the behaviors of sexual abuse victims whom the experts had dealt with in the past. In response, defendant Maday moved that the trial court require the victims to submit to psychological examinations by psychologists of his choice. *Maday*, 179 Wis. 2d at 350,

507 N.W.2d at 368. The trial court denied the request. *Id.* at 351, 507 N.W.2d at 368.

On appeal, this court held that Maday was entitled to a pretrial psychological examination of the complainants based upon fundamental fairness. *Id.* at 357, 507 N.W.2d at 370-71. We concluded that a fair trial could not be guaranteed by responsive mechanisms such as cross-examination and argument where the State was relying on experts who had previously examined the victims because such personal interviews are the foundation for a credible opinion by a psychologist. *Id.* at 355-57, 507 N.W.2d at 370-71. We further concluded that allowing the State to present such testimony while preventing the defendant from doing the same gave the State an improper strategic advantage and deprived the defendant of a level playing field. *Id.* at 357, 507 N.W.2d at 370.

Mainiero relies on the fundamental fairness rationale of *Maday* and asserts that because the State chose to place into issue the complainant's psychiatric hospitalization as corroboration of the sexual assault allegations, he should be given access to the complainant's records in order to counter the State. He also argues that "given the state's reliance upon the conclusions of those professionals on the issue of causation, the revelation of information concerning an alternative cause . . . would have entitled Mr. Mainiero to an independent psychiatric examination." We disagree.

The facts and circumstances here differ from those in *Maday*. In *Maday*, the State was responsible for generating the psychological evidence at issue, whereas here the complainant sought psychiatric treatment independent of the State. More importantly, unlike *Maday*, where the State intended to present expert testimony from five experts, the State in this

case did not introduce any expert testimony regarding the complainant's psychiatric condition after making the sexual assault allegations. Therefore, the strategic advantage caused by the State using experts who personally interviewed the complainants in *Maday* is absent in this case.

Further, unlike in *Maday*, responsive mechanisms such as cross-examination and argument were sufficient in this case to guarantee Mainiero a fair trial. Here, the State offered testimony by the complainant that she entered the hospital for psychiatric treatment for depression related to the alleged sexual assault. The State did not rely on any expert testimony, nor did it rely on or introduce any portion of the complainant's records. Therefore, nothing precluded Mainiero from effectively challenging the State's cause and effect theory through cross-examination of the complainant. Mainiero's counsel could have asked the complainant if there were any other reasons why she might have been depressed and suicidal at the time she was admitted to the psychiatric unit. If after her answer the trial court believed that information in her psychiatric records was material to the fairness of the trial, it would have been obligated to release such information.[2] *Ritchie*,

[2] It is clear from the record that the trial court recognized its duty to disclose material information and was prepared to do so if testimony revealed the materiality of anything in the complainant's records. In making its initial determination that there was nothing in the records necessary for Mainiero's defense, the trial court stated:

> That, in my estimation may be subject to change as the testimony develops if somebody testifies to the contrary and there may as develops be a prior inconsistent statement embodied in those documents, but at this point I do not see that and that is the initial ruling of the court.

480 U.S. at 60. Therefore, we cannot conclude that Mainiero was deprived of a level playing field.

[4]

In sum, we conclude that the court's in camera review of the records was sufficient to serve Mainiero's constitutional rights to due process and a fair trial while protecting the privacy rights of the complainant.

III. CHARACTER EVIDENCE

Prior to trial, the State filed a motion in limine to prevent Mainiero from presenting the testimony of other babysitters for Mainiero's children who were not sexually assaulted by him. The State argued that such evidence was improper under § 904.04, STATS., which generally prohibits the use of character evidence for the purpose of proving that the person acted in conformity on a particular occasion. Mainiero asserted that such evidence was admissible under § 904.04(1)(a), which allows character evidence offered by an accused to rebut the State's evidence. In doing so, Mainiero's counsel explained the scope of such testimony as follows:

> I submit that I ought to be allowed to put in testimony of the defendant's . . . good character which would be pertinent to the charge here and that is *his good character for sexual morality*, for decency, for being non exploitive with children.. . . [The prior babysitters] will testify if allowed that they believe him to be of *good character for sexual morality, decency, respect for women*, those topics. [Emphasis added.]

The State then informed the court that if the issue of sexual morality was presented, it would most likely present rebuttal witnesses on that issue. The trial

court deferred ruling on the admissibility of such evidence until after the State's case.

Subsequently, Mainiero's counsel narrowed the purpose for which he proposed presenting the former babysitters' testimony. Following jury selection, counsel stated:

> [W]hat I am looking to do is put in evidence of his character for not being sexually exploitive of children; that is, we are not talking about anything beyond that.

In his offer of proof on the matter, counsel stated:

> I would then ask them whether or not on the basis of the interaction with Mr. Mainiero . . . they have been able to form an opinion as to *his character for sexual morality in terms of dealing with people who are in his house spending the night as baby-sitters*.. . . I would offer that testimony for a very limited purpose of showing what I perceive to be a pertinent character trait offered by the defense to demonstrate that he can in this circumstance be inferred to have acted in accordance with that character. [Emphasis added.]

Over the State's objection, the trial court allowed the testimony of the babysitters. Both testified that Mainiero had given them massages on numerous occasions but that he had never engaged in any improper sexual behavior with them.

During its cross-examination of Mainiero, the State asked him whether he had an "open" or sexual relationship with Susan Saliga, an adult. Mainiero's counsel objected to this line of questioning on the grounds that it was irrelevant and prejudicial, but was overruled. Mainiero admitted having had a relationship and sexual contact with Saliga in 1983 before he

was married but denied having had intercourse with her. During its rebuttal, the State called Saliga to testify. Again, Mainiero objected on relevance grounds to any direct testimony by Saliga. The trial court overruled Mainiero's objection and allowed Saliga's testimony for the purpose of rebutting the former babysitters' testimony regarding Mainiero's character for sexual morality.

Saliga testified that she and her husband were friends with Mainiero and his wife Sharon. Saliga stated that Mainiero had told her that he had "an open relationship" with Sharon and that "he could love more than one woman at one time." She stated that he eventually began touching her inappropriately sometime between 1984 and 1986. Specifically, she testified that on one occasion he touched her breasts when the two couples were camping, and on another occasion while at his home he undressed both of them and touched her genitals and breasts.

Mainiero argues that the trial court committed reversible error in allowing the State to cross-examine him about his prior relationship with Saliga and to introduce evidence in its rebuttal of Mainiero's bad character for sexual morality through Saliga's direct testimony.

A. Cross-examination

[5, 6]

We first address Mainiero's argument that the State's cross-examination regarding his relationship with Saliga was irrelevant and prejudicial. When reviewing evidentiary issues, the test is not whether this court agrees with the ruling of the trial court, but whether the trial court exercised discretion in accordance with accepted legal standards and in accordance

with the facts of record. *State v. Pharr*, 115 Wis. 2d 334, 342, 340 N.W.2d 498, 501 (1983). We will not find a misuse of discretion if there is a reasonable basis for the court's determination. *Id.* However, there should be evidence in the record to indicate that the trial court exercised its discretion and provided the basis for its discretionary determination. *Id.*

The record reveals that Mainiero's counsel requested a sidebar conference after Mainiero answered two questions regarding his relationship with Saliga. The sidebar was not transcribed, but it is apparent that the trial court overruled Mainiero's objection. Subsequently, Mainiero's counsel summarized the sidebar on the record, stating that he had objected on the grounds that such evidence was irrelevant and prejudicial and gave his reasoning. However, neither the trial court nor counsel summarized the basis for the trial court's decision to overrule the objection.[3]

[7]

Therefore, the record inadequately sets forth the trial court's reasoning for its ruling. In such cases, we independently review the record to determine whether it provides a basis for the court's exercise of discretion. *Pharr*, 115 Wis. 2d at 343, 340 N.W.2d at 502. In general, we look for reasons to sustain a trial court's discretionary ruling. *State v. Thompson*, 146 Wis. 2d 554, 559, 431 N.W.2d 716, 718 (Ct. App. 1988). We will

[3] We recognize that sidebar conferences and after-the-fact summations of those conferences are commonplace in some courtrooms. We caution, however, that appellate review is better served by counsel following the § 901.03(1)(a), STATS., procedure of stating objections and grounds on the record. If a matter is significant enough to invite appellate review, it is too important to subject to a remote summation procedure.

uphold a trial court's discretionary decision if the record contains facts which would support the decision had the court fully exercised its discretion. *State v. Gulrud*, 140 Wis. 2d 721, 734, 412 N.W.2d 139, 144 (Ct. App. 1987).

[8]

Mainiero first argues that his relationship with Saliga, an adult woman, was irrelevant. The proper standard for the test of relevancy on cross-examination is whether the answer sought will be useful to the trier of fact in appraising the credibility of the witness and evaluating the probative value of the direct testimony. *Rogers v. State*, 93 Wis. 2d 682, 689, 287 N.W.2d 774, 777 (1980).

[9]

On both direct and cross-examination, Mainiero was questioned about a statement he made to the complainant that he had an "open relationship" with his wife. Mainiero described the term "open" as meaning "accepting of people and caring and that sort of thing," as opposed to a "non-monogamous relationship." It was within this context that the State asked Mainiero if he had an open relationship or sexual contact or intercourse with Saliga. The trial court could have reasonably determined such questions to be directed at Mainiero's credibility regarding his description of an "open relationship." Accordingly, we conclude that the record provides a basis for the court's discretionary determination regarding the relevancy of the cross-examination.[4]

[4] Mainiero also states that the cross-examination regarding Saliga was unfairly prejudicial and therefore should have been excluded despite any potential relevancy. However, while Mainiero develops this argument with regard to Saliga's direct testimony, he fails to show why the cross-examination testi-

B. Saliga's Direct Testimony

We next address Mainiero's argument that Saliga's direct testimony was irrelevant and unfairly prejudicial to his case. Mainiero contends that Saliga's testimony was not relevant because he never claimed total sexual fidelity to his wife, and that allegations of his sexual advances to an adult woman are totally irrelevant to the claim that he sexually molested a young girl years later. He further argues that even if Saliga's testimony passes the relevancy test, its prejudicial effect outweighed any possible probative value. *See* § 904.03, STATS. (relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice).

The trial court, in overruling Mainiero's objection, concluded that Saliga's testimony was admissible under § 904.04(1)(a), STATS., as evidence of a personality trait offered to rebut the defense's testimony from the former babysitters regarding his sexual morality. Mainiero contends that the character trait placed in issue was carefully limited to that for sexual morality in dealing with young babysitters in his home, not sexual morality in general.

[10, 11]

We recall here that a trial court's evidentiary determinations are discretionary in nature and the relevant question is not whether this court would have permitted the testimony in question, but whether the trial court exercised its discretion in accordance with accepted legal standards and in accordance with the

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mony at issue was unduly prejudicial. An issue raised but not argued is deemed abandoned. *Reiman Assocs., Inc. v. R/A Advertising, Inc.*, 102 Wis. 2d 305, 306 n.1, 306 N.W.2d 292, 294 (Ct. App. 1981).

facts of record. *Pharr*, 115 Wis. 2d at 342, 340 N.W.2d at 501. Under § 904.04(1)(a), STATS., "the State's introduction of character evidence is limited to that which rebuts the character trait being established." *State v. Brecht*, 143 Wis. 2d 297, 323, 421 N.W.2d 96, 106 (1988).

The record indicates that the court believed that Mainiero had limited the character trait at issue *to a certain extent*, but left the door open regarding his sexual morality in general:

> Clearly, [§ 904.04(1)(a), STATS.] envisions such a circumstance as we have here. I think that even though there may have been some tailoring as far as babysitting, I direct my attention to . . . [the testimony of] Mrs. Vanasse regarding her experiences in a massage that clearly have called into play, the pertinent character trait of morality of the defendant. It is a precarious situation, but certainly, one in which the defense has chosen to trod and I think the State is entitled to rebut.

Based upon our independent review of the record, we cannot conclude that the trial court misused its discretion in allowing Saliga's testimony. Prior to trial, Mainiero's counsel stated that he would offer character witnesses to testify that they believed Mainiero "to be of good character for sexual morality, decency, respect for women, those topics." It is true that counsel subsequently attempted to narrow the character trait at issue to Mainiero's sexual morality with babysitters. However, in addition to the former babysitters, Mainiero called two adult witnesses who testified that Mainiero gave them full body massages while they were almost totally unclothed without any improper

sexual behavior, which relates more to his sexual morality in general.

Regarding the relevancy of Saliga's testimony, the trial court stated:

> [B]ased on the limited offer of proof available to this court at this time, the fact that this alleged relationship [with Saliga] ended in 1987 within the same general time frame, close to a year, that [D.V.] began babysitting, that there is certainly a closeness to the time of sufficiency, in the court's estimation to meet the hurdle of relevancy.

We cannot conclude that the court misused its discretion in making this relevancy determination based on the totality of the facts and circumstances presented to the court at the time.

[12]

Further, we cannot conclude that Saliga's testimony was unfairly prejudicial. "[U]nfair prejudice results where the proffered evidence, if introduced, would have a tendency to influence the outcome by improper means or if it . . . causes a jury to base its decision on something other than the established propositions in the case." *State v. Mordica*, 168 Wis. 2d 593, 605, 484 N.W.2d 352, 357 (Ct. App. 1992). Saliga acknowledged in her testimony that Mainiero was not married during their relationship, and that their relationship was consensual except for the improper sexual conduct. Further, Saliga's testimony was balanced by Mainiero's witnesses who testified that he had never engaged in any improper sexual behavior with them. Saliga's testimony, therefore, was not of the type likely to improperly influence the jury; rather, it was simply one piece of many in the larger credibility question.

[13]

The issue is not whether this court, ruling initially on the admissibility of the evidence, would have permitted it to come in or whether we agree with the trial court's ruling. *Pharr*, 115 Wis. 2d at 342, 340 N.W.2d at 501. Rather, the question is whether appropriate discretion was exercised and there was a reasonable basis for the court's determination. *Id.* We hold that there was.

IV. PRIOR CONSISTENT STATEMENTS EVIDENCE

We next address Mainiero's argument that the trial court improperly admitted the complainant's mother's testimony regarding the complainant's prior consistent statements concerning the alleged sexual assaults. On March 12, 1992, the complainant first revealed Mainiero's conduct to her mother and her high school social worker in the social worker's office at school. During its direct examination of the complainant's mother, the State asked: "Did your daughter then relate to you anything that had occurred to her?" Mainiero's counsel objected on hearsay grounds, and the trial court sustained the objection.

During cross-examination, Mainiero's counsel asked the complainant's mother whether the complainant ever told her that she and Mainiero had sexual intercourse, to which the mother stated "no." On redirect, the State again attempted to elicit what the complainant had told her about the alleged sexual assaults. Mainiero objected on hearsay grounds, but this time the court allowed such evidence on the grounds that the defense had "opened the door" to such testimony by asking the question concerning whether

the complainant had alleged that she had intercourse with Mainiero.

The complainant's mother testified that on March 12 her daughter told her that Mainiero had licked her breasts and touched her vagina, but that she "didn't give a whole lot of detail." She further testified that following March 12, her daughter told her that Mainiero had rubbed her body with oil while she was naked, kissed her, and fondled her breasts and vagina.

Mainiero argues that the trial court misused its discretion by allowing such testimony because a witness's prior consistent statements are generally inadmissible hearsay unless offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive. *See* § 908.01(4)(a)2, STATS. Mainiero points out that he did not allege that the complainant's allegations were the result of recent fabrication or improper influence or motive, and the trial court did not rely on such grounds in admitting the prior statements.

[14]

While the admissibility of evidence is generally a question addressed to the trial court's discretion, a trial court misuses its discretion if it makes an error of law. *State v. Peters*, 166 Wis. 2d 168, 175, 479 N.W.2d 198, 200 (Ct. App. 1991). We agree with Mainiero that the court erred as a matter of law in allowing the testimony regarding the complainant's prior consistent statements. However, we conclude that the error was harmless.

Mainiero's cross-examination of the complainant's mother at issue is as follows:

Q Your daughter had not told you that Lou Mainiero had had sexual intercourse with her, had she?

A No.

Q Did you ever tell anybody that it was your daughter's claim that Lou Mainiero had had sexual intercourse with her?

A Never.

Q Did you ever tell anybody that Lou Mainiero was going to be charged with first degree sexual assault because he had had sexual intercourse with your daughter?

A No.

The trial court concluded that implicit in this line of questioning was an allegation or inference that the complainant at some point had made a statement inconsistent with her testimony, and the State was therefore entitled to rehabilitate the complaint through the mother's testimony.

[15]

We cannot construe Mainiero's cross-examination as a charge of recent fabrication or improper influence or motive as necessary for the admissibility of the prior consistent statements under § 908.01(4)(a)2, STATS. Based on our review of the record, this line of questioning was aimed at the mother's credibility, not the complainant's.[5] Even if we were to construe the cross-examination as an allegation that the complainant was lying, such an allegation, standing alone, is not suffi-

[5] Mainiero subsequently produced a witness who testified that the complainant's mother told her that Mainiero would be charged with first-degree sexual assault because he had intercourse with her daughter.

cient to render the prior consistent statement admissible. *Peters*, 166 Wis. 2d at 177, 479 N.W.2d at 201.

> The allegation must be that the fabrication is recent or based upon an improper influence or motive. This requirement exists because the prior consistent statements must predate the alleged recent fabrication or improper influence or motive before they have probative value.

Id. Accordingly, because there was no express or implied charge of recent fabrication or improper influence or motive, the complainant's mother's testimony regarding the complainant's prior consistent statements was inadmissible hearsay.[6]

[16]

Although we hold that the trial court erred as a matter of law in allowing the testimony, we conclude that the error was harmless. An error is harmless if there is no reasonable possibility that the error contributed to the conviction. *State v. Dyess*, 124 Wis. 2d 525, 543, 370 N.W.2d 222, 231-32 (1985).

The outcome of this case hinged on who the jury ultimately believed—Mainiero or the complainant.

[6]The State concedes that this testimony would ordinarily constitute inadmissible hearsay. However, the State argues that the complainant's prior statements to her mother are admissible under the "rule of completeness" as articulated in *State v. Sharp*, 180 Wis. 2d 640, 511 N.W.2d 316 (Ct. App. 1993). That rule "require[s] that a statement be admitted in its entirety when this is necessary to explain the admitted portion, to place it in context, or to avoid misleading the trier of fact, or to ensure a fair and impartial understanding of the admitted portion." *Id.* at 653-54, 511 N.W.2d at 322 (quoted source omitted). Because no partial or incomplete statement was introduced here, we conclude that the rule is inapplicable in this case.

Mainiero argues that the admission of the complainant's prior statement to her mother "substantially bolstered the complainant's credibility." We disagree. The testimony in question was merely a brief summary of the complainant's allegations and not nearly as detailed as the complainant's direct testimony. In fact, the complainant's mother testified that her daughter did not give her many details. Therefore, we conclude that there is no reasonable possibility that the error contributed to Mainiero's sexual assault conviction.

V. CONCLUSION

In sum, we affirm the judgments of conviction. We conclude that the trial court's in camera review of the complainant's psychiatric records was sufficient to protect Mainiero's constitutional rights to due process and a fair trial. Further, we conclude that any error resulting from the trial court's misuse of discretion in allowing the testimony complained of was harmless.

By the Court.—Judgments affirmed.

APPENDIX F

STATE OF WISCONSIN
WAUKESHA COUNTY COUNTY CIRCUIT COURT

STATE OF WISCONSIN,

Plaintiff,

v. Case No. 92-CF-205

LOUIS M. MAINIERO,

Defendant.

ORAL DECISION ON MOTION FOR DISCLOSURE OF PSYCHIATRIC RECORDS

THE COURT: The court has now received and reviewed psychiatric reports pertaining to the hospitalization of the alleged victim J_____ M_____ occurring in the later part of March and into April of 1992 at Waukesha Memorial Hospital. I would note that certain portions of those materials were to me, illegible, but as best I could decipher or subsequently transcribed into typed reports contained within the file. This court's review of all of that information would be somewhat summarized as follows: That Miss M_____ was hospitalized for attempted suicide or suicidal ideations; that she was ultimately diagnosed as number one, being depressed,

and number two, as suffering from post-traumatic stress disorder. The overall theme of the reports deals with her treatment with that depression, self-respect issues and so on, and the only cause that is recited in those reports pertains to the allegations of sexual assault made against Mr. Mainiero. There is reference in the report that Miss M_____ may also have been sad or grieving the death of a friend from leukemia during the month of January, 1992, but the primary focus of the reports again deals with the sexual assault allegations and her inability to cope with the ramifications of that event. Of specific note to the court, was that there was no evidence of any delusional thinking, any hallucinations, anything that would indicate inability to discern reality from fiction or any sort of mental illness in that category. It is further the court's review of those documents that in reference to the sexual assault, the court was not aware of any contradictory statements from the information I gleaned in the criminal complaint and the nature of the charges. Based on that review of the documents, it is the court's opinion that there is nothing contained therein that would be reasonable and necessary for a presentation of the defense's case or cross examination of Miss M_____. That is, therefore, the basis for the court's finding. The record should not be made available to defense counsel in anticipation of trial.

(The foregoing decision was dictated to the reporter in chambers, outside the presence of the parties.)

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